

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

March 17, 2017

Via U.S. Mail and FOIAonline

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington DC 20460

Via U.S. Mail and FOIAonline

Regional Freedom of Information Officer
U.S. EPA, Region 10
Office of Ecosystems, Tribal and Public Affairs
1200 6th Avenue ETPA-124
Seattle, WA 98101

RE: Freedom of Information Act Request for Records Related to Ex-Independence

Dear FOIA Officer:

This is a request records under the Freedom of Information Act (5 U.S.C. § 552) on behalf of Puget Soundkeeper Alliance, Washington Environmental Council, and the Suquamish Tribe.

The term “record” in this request has the broadest possible meaning under FOIA, *see* 5 U.S.C. § 552(f)(2), and includes but is not limited to reports, studies, data, surveys, memos, notes, policy papers, photos, videos, and any recording of any form of communication, such as letters, e-mails, and other electronic communications.

This request generally relates to the decommissioning of Navy ships. “USS Independence” refers to a particular ship by that name with the hull number CV 62, which is also known as the “Ex-Independence” or “Ex-Indy.” These terms are used interchangeably.

Records Requested

The specific records requested are the following:

1. All records involving the Navy, NOAA, NMFS, other federal or state agencies or other persons about the Navy’s in-water brushing, scraping, or cleaning of the hull of the former USS Independence or other decommissioned Navy ships in Puget Sound (including as part of any inactive ship tow program), including but not limited to communications concerning compliance with the Clean Water Act and other environmental protection laws and regulations, transmitted or received from January 1, 2012, to the present, including EPA

headquarters, EPA Region 10, including but not limited to Peter Murchie, Susan Poulson, Leah Brown, and Tara Martich.

2. All records concerning the applicability of the Clean Water Act and other environmental protection laws and regulations to Navy hull cleaning activities for the period January 1, 2012 to present.
3. All records concerning the applicability of the Clean Water Act and other environmental protection laws and regulations to in-water ship hull cleaning activities for the period January 1, 2012 to present.
4. All records concerning any NPDES permit renewal application and any NPDES permit issued by any agency for Naval Base Kitsap Bremerton and Puget Sound Naval Shipyard from September 1, 1998 to the present.
5. All records concerning any NPDES permit issued by any agency to authorize the discharge of pollutants from in-water hull cleaning or maintenance activities for the period January 1, 2012 to present.
6. All records concerning any in-water hull cleaning of any vessel or floating craft that was not required to obtain a NPDES permit from the EPA for the period January 1, 2012 to present.
7. All records concerning the potential impacts to water quality or sediments from the Navy's in-water brushing, scraping, or cleaning of the hull of the former USS Independence at Bremerton, Washington, or other decommissioned Navy ships in Puget Sound (including as part of any inactive ship tow program) for the period January 1, 2012 to present.

Fee Waiver Request

We respectfully request that you waive any and all fees assessed for this request. The information requested is in the public interest and can lead to a greater understanding of the regulatory regime governing in-water hull work on de-commissioned Navy ships, and the environmental impact of such activities. None of the requestors seek the information for any private or commercial purposes. Our interest in the records is for public participation, advocacy for public interest goals, and a more responsive and accountable government that promotes environmental protection and protection of human health and safety.

Puget Soundkeeper Alliance and Washington Environmental Council are both 501(c)(3) nonprofit organizations dedicated to improving environmental quality for the benefit of the public in Puget Sound specifically and Washington State generally. *See* www.pugetsoundkeeper.org; www.wecprotects.org.

Moreover, the Suquamish Tribe makes this FOIA request in the Tribe's sovereign governmental capacity not as a commercial requester. Disclosure of the requested information to the Tribe is in the public interest because it will provide governmental transparency regarding the agency's evaluation of environmental impacts. The Tribal government will review the information presented in the documents under its FOIA request. Access to the information will enable the Tribe to make important governmental decisions and to share its knowledge with Suquamish tribal members.

I. This FOIA Request Meets the Fee Waiver Requirements of FOIA and 40 C.F.R. §2.107(1).

5 USC § 552(a)(4)(A)(iii) of FOIA "requires agencies to waive fees for requesters able to demonstrate that 'disclosure of the information is in the public interest.'" *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C.C. 2003). In order to demonstrate that a FOIA Request is in the public interest, and therefore eligible for a fee waiver, the requester must show that disclosure of the information 'is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.'" *Id.* at 1312 (citing 5 U.S.C. § 552(a)(4)(A)(iii)).

"Congress intended independent researchers, journalists, and *public interest watchdog groups* to have inexpensive access to government records in order to provide the type of public disclosure believed essential to our society Congress ensured that when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attached to their request." *Inst. for Wildlife Prot. v. United States Fish & Wildlife Serv.*, (290 F. Supp. 2d 1226, 1232 (D. Or. 2003) (emphasis added). "Congress amended FOIA to ensure that it is 'liberally construed in favor of waivers for noncommercial requesters.'" *Judicial Watch, Inc.*, at 1312 (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27,190 (1986) (Sen. Leahy)).

a. First Fee Waiver Requirement (Public Understanding)

Under 40 C.F.R. § 2.107(l)(2), to determine whether the first fee waiver requirement is met (likely to contribute significantly to the public understanding of the operations or activities of the federal government) FOIA Offices will consider the following four factors:

- (i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.
- (ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information

that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. FOI Offices will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public. (40 C.F.R. § 2.107(l)(2)).

Factor 1:

The requested records concern the operations and activities of the Federal government. The Environmental Protection Agency (EPA) is part of the Federal government and this request seeks information regarding its activities and communications with other agencies as they relate to in-water work to decommission Navy ships and prepare them for relocation. In particular, this request seeks information regarding the environmental impact of these federal government activities. The request is narrowly tailored, targeting specific, identified records related to these federal activities.

In addition, this request is likely to show the mental impressions, reasons, and policy decisions of the government officials involved in formulating, discussing, and finalizing the plan and legal authority to carry out the in-water hull work that is the target of this request.

Factors 2 and 4

The disclosure is likely to contribute to a public understanding of government operations or activities. To the best of our knowledge, none of the records requested are in the public domain currently. These records and communications in connection with the in-water work related to decommissioned Navy ships will likely provide necessary insight into the mental impressions, reasons, and policy decisions of those involved in formulating, discussing, and authorizing this in-water work.

The records are also likely to contribute to the public's understanding of the likely environmental impact of the in-water work, including possibly contribution to the degradation of water quality in Sinclair Inlet, Puget Sound, and other water bodies.

Finally, the records will likely aid in the public's understanding of the specifics of the in-water work, measures taken to mitigate water quality degradation (if any), and the reasons why certain procedures, methods or equipment are used.

Unlike other federal government agency actions (like rulemaking, investigations, etc.), where there is a clear record for decision-making, there is no such record or documentation for compliance inspections readily available to the public. The public understanding will be significantly enhanced by releasing the specific records requested by having access to and seeing more of the record and accompanying documents of how their government arrived at this decision.

Factor 3

The disclosure is likely to contribute to the public understanding of a reasonably broad audience of persons interested in the subject matter. Puget Soundkeeper Alliance, Washington Environmental Council and the Suquamish Tribe (collectively "the requestors") all have extensive expertise in the subject area. The requestors' staff has many years of experience directly related to environmental regulation in Puget Sound and efforts to improve water quality. The requestors consistently obtain information about pollutant loading to Puget Sound and other water bodies, and consistently use their capacities to read, dissect, and share the information in an easily understandable format for their members and the public.

Chris Wilke, Executive Director of Puget Soundkeeper Alliance, is also regularly requested to comment or be interviewed for news articles and news shows related to Puget Sound water quality issues. Dr. Mindy Roberts, Puget Sound Director at the Washington Environmental Council, has led many investigation of pollutant loading to Puget Sound and was involved with previous U.S. Navy monitoring and modeling efforts to characterize pollution in Sinclair Inlet, including describing technical results to broad public audiences in and around Bremerton, Washington. The requestors regularly write and disseminate newsletter and other publications to the public, conduct outreach at public events, and incorporate issue-specific educational components into volunteer events – reaching literally tens of thousands of members and supporters in the Puget Sound region every year.

The requestors collectively have a very broad audience of members and supporters across the Puget Sound region, spanning a wide spectrum of walks of life, age, ethnicity, gender identity and preference, religious beliefs, cultural backgrounds, income level, educational background, political belief, and with varying levels of awareness about water quality and pollution concerns. A common threat that connects each member of the audience is a shared interest in clean water, and protecting clean water for all – which lies at the very root of the subject matter requested in this request.

It is very likely that a reasonably broad audience will be interested in the EPA's process and basis for approving the in-water work because the public wants to know if federal agencies have complied with federal environmental and procedural laws and regulations.

b. Second Fee Waiver Requirement (Commercial Interest)

Under 40 C.F.R. 2.107(l)(3), in order to determine whether the second fee waiver requirement is met (request is primarily in the commercial interest of the requester, FOIA offices will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. FOI Offices will consider any commercial interest of the requester (with reference to the definition of "commercial use request" in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters will be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. FOI Offices ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

Factor 1

The requestors have no commercial interest that would be furthered by the requested records. Puget Soundkeeper Alliance and Washington Environmental Council are non-profit public interest groups, requesting this information on behalf of its members and the public. The Suquamish Tribe is a sovereign nation, also requesting this information on behalf of its members and the public. The requestors do not seek this information for a use or purpose that furthers their the commercial trade or profit interests. The requestors will not profit from the requested information. The requestors will not receive monetary or other benefits from disclosing the request information to the public.

Factor 2

The public interest in disclosure outweighs any remote commercial interest that EPA may assert that the requestors have in the requested information. The requestors are not requesting the information for any private or commercial purpose. The requestors are non-profit, public interest organizations designated as tax exempt entities under IRS code 501(c)(3), and a sovereign nation. The requestors' interest in the disclosure of these records is for public education, public participation and advocacy for public interest goals, as well as a more responsive and accountable government that promotes environmental protection and protection of human health and safety.

If you determine not to waive fees for this request, please inform me and provide an estimate of the fees.

If anything in this request is unclear, please contact us to discuss.

Sincerely,

SMITH & LOWNEY PLLC

By: Richard Smith

Richard Smith